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No. 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

ANDREW G. NELSON, INC.,
Appellant,

v.

UNITED STATES OF AMERICA, ET AL.

On Appeal From the United States District Court
For the Northern District of Illinois.

Petition for Rehearing

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This Court's March 3, 1958 opinion in this case makes it apparent that the crucial question—the one on which the decision of the case turns—is whether or not the commodity description "*stock* in trade of drug stores" means the same thing as "goods such as are sold in drug stores." If so, upon the authority of *Interstate Commerce Commission* v. *Ratner*, 6 Federal Carriers Cases,

par. 80,415 (N.D. Ill., April 15, 1947), *Sanders Extension of Operations—Washington, D. C.*, 47 M.C.C. 210 (1947), and *Vidas Contract Carrier Application*, 62 M.C.C. 106 (1953), the phrase "*stock* in trade of drug stores" is nothing more than a generic commodity description by reference to place of sale, and the Commission's decision is clearly erroneous; if not, by analogy to such commodity descriptions as "contractors' equipment and supplies" and "packing house supplies" and upon the authority of *C & H Transp. Co., Inc., Interpretation of Certificate*, 62 M.C.C. 586 (1954) and *Dart Transit Co.—Modification of Permit*, 49 M.C.C. 607 (1949), the Commission was correct in holding that the phrase "*stock* in trade of drug stores" constitutes a restrictive commodity description by reference to intended use.[1]

The Court concluded that "*stock* in trade of drug stores" is not the same as "goods such as are sold in drug stores" for essentially two reasons: (1) "*stock* in trade of drug stores," taken in its ordinary sense, connotes possession and really means the same as "drug stores' stock"—an interpretation which is bolstered in this case by the fact that the record before the Commission when the permit was granted showed that Nelson was "hauling Walgreen's drugstore stock, and not goods such as might be stocked for sale by Walgreen;" and (2) the Commission has consistently used the phrase "such as," or a close variation thereof, when it intended a generic commodity description by reference to place of sale, but there is no such phrase in appellant's permit.

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[1] We believe the Commission achieved an unwarranted extension of its interpretive powers in the **C. & H. Transp. Co.** and **Dart Transit Co.** cases and would like to call the Court's attention to the discussion of this subject on pages 23-29 of appellant's brief. However, since, in its opinion, the Court has impliedly approved of those cases, we do not attempt to reargue the point here.

The sole reason for this petition for rehearing is that we believe it can be conclusively demonstrated, by careful examination of the evolution of the Commission's commodity description techniques, that these are not valid reasons for concluding that "*stock* in trade of drug stores" was intended to mean something different than "goods such as are sold in drug stores," but that, on the contrary, the Commission which granted Nelson's permit must have intended these phrases to mean the same thing. As it presently stands, this Court's opinion is founded upon an erroneous view of the historical setting in which appellant's permit was granted, and we are fearful that this error might be due to a failure on our part to make a sufficiently clear exposition of the historical background.

Everyone agrees that the important thing is what was intended to be authorized by the language of appellant's permit—and the key to what was intended is to be found in a careful analysis and comparison of the way in which the Commission dealt with the grandfather applications of approximately 600 A & P contract carriers and Andrew G. Nelson in the early days of motor carrier regulation.[2]

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[2] The history of the A&P contract carriers and the problems which the Commission encountered in bringing them under regulation are discussed in two cases involving A&P contract carriers: **Keystone Transp. Co. Contract Carrier Application**, 19 M.C.C. 475 (1939) and **McAteer Contract Carrier Application**, 42 M.C.C. 35 (1943). Inasmuch as frequent citation of these cases will be necessary, they will often be referred to simply as the **Keystone** and **McAteer** cases, without full citation.

STATEMENT

Applications of the A & P Contract Carriers

During the early 1930's, the Great Atlantic and Pacific Tea Company developed a transportation system in which air, water, rail, and motor *common* carriers were used for long hauls and motor *contract* carriers were used for short hauls. *McAteer* at 39. The motor contract carriers hauled only for A & P and were required to transport anything their equipment could handle, wherever and whenever directed by A & P; consequently, they transported a wide variety of commodities between A & P's independent suppliers (where shipment was f.o.b. origin), manufacturing subsidiaries, warehouses, and retail stores. *McAteer* at 39-40; *Keystone* at 498.

After the Motor Carrier Act was passed, in 1935, approximately 600 A & P contract carriers, with the help of the Company, filed applications for motor contract carrier permits under the grandfather clause of the Act. *Keystone* at 482. Conferences were held between the applicants, the Company, and the Commission's Bureau of Motor Carriers and considerable thought was given as to the scope of the operating rights to which the A & P contract carriers were entitled. *Keystone* at 482. Finally, on January 5, 1937, the Commission issued a compliance order[3] to Thomas Jones, one of the A & P contract carriers. *Keystone* at 482. The applicant and the Company made certain objections to the compliance order and on

[3] A compliance order typically embodied a finding as to the scope of the applicant's operations during the crucial grandfather period and directed the issuance of a permit in accordance with that finding upon the applicant's complying with certain formalities.

November 29, 1937, the Commission amended the compliance order so as to authorize the issuance of a permit to transport the following commodities (*Keystone* at 483):

> Such merchandise as is dealt in by wholesale, retail, and chain grocery and food business houses, and in connection therewith, equipment, materials, and supplies used in the conduct of such business * * *.

The applicant and the Company at first made some objections to this amended compliance order, but later accepted it and it became final. *Keystone* at 483. Once the pattern had been established, similar orders were entered in response to the applications of 189 of the other A & P contract carriers; however, certain rail carriers objected to these compliance orders as authorizing operations too broad in scope and suggested that the permits, when issued, should authorize the transportation of the commodities described *only* under contracts with "persons who operate retail stores, the chief business of which is the sale of food." *Keystone* at 483. As a result of these objections, on May 20, 1938, the Commission stayed 83 of the 189 compliance orders which had been entered and held a full scale hearing in the *Keystone* case in order to determine whether or not it could and should limit the A & P contract carriers' permits as suggested by the rail carriers.[4] *Keystone* at 476, 483-484.

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[4] The matter was one of considerable doubt because the Commission had previously held that it had no power to restrict the right of a contract carrier to substitute or add contracts within the scope of its permit (a right guaranteed by Section 209(b) of the Motor Carrier Act) by precluding transportation for a shipper other than that with which it had a contract at the time the permit was granted. **Longshore Contract Carrier Application**, 2 M.C.C. 480 (1937).

After considerable debate, the Commission decided that it did have the power to restrict a contract carrier to the transportation of specified commodities for the same class of shipper which it was serving during the grandfather period. *Keystone Transp. Co. Contract Carrier Application,* 19 M.C.C. 475 (1939).

The A & P contract carriers sought reconsideration of the *Keystone* decision, choosing the McAteer application as the test case because it permitted a better exposition of the scope of A & P's operations.[5] *McAteer* at 38. However, the Commission merely reaffirmed its opinion in the *Keystone* case. *McAteer Contract Carrier Application,* 42 M.C.C. 35 (1943).

Application of Andrew G. Nelson

On January 2, 1936, Nelson applied for a contract carrier permit to transport "store fixtures, miscellaneous merchandise and household furniture." (R. 248). His application and supporting documents described his past operation as an interstate carrier under exclusive contract with the Walgreen Company to transport (1) store fixtures, equipment, and miscellaneous merchandise belonging to the Walgreen Company to and from Walgreen retail stores in connection with the opening, closing, and remodeling of stores or, occasionally, in connection with

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[5] McAteer was not one of the 83 A&P contract carriers whose compliance orders were stayed pending the outcome of the **Keystone** case; however, that case was decided before McAteer's permit was issued and clearly indicated that all future permits issued to A&P contract carriers were to contain a Keystone restriction, **i.e.**, a clause limiting the class of shippers which could be served. **McAteer** at 38. Consequently, McAteer was in a position to ask for consideration of his own application as a test case.

a transfer of stock and (2) household goods belonging to Walgreen Company employees who presumably were being transferred and whose moving expenses were being paid by Walgreen. (R. 247-249, 264-268.)

On February 14, 1938, the Commission issued a compliance order authorizing the issuance of a permit to Nelson to transport the "commodities indicated" as follows (R. 230-231):

> "*New and used store fixtures, new and used household goods*, and *stock* in trade of drug stores."[6]

On March 13, 1942, the Commision issued to Nelson a permit containing exactly the same commodity authorization as the 1938 compliance order. (R. 232.)

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[6] The Court, in its opinion (note 2), states that neither party attaches any significance to the underscoring of certain words in the commodity description. It was the Commission's usual practice to separate general groupings of commodity descriptions by the use of divided underscoring. **Pierce Auto Freight Lines, Inc., v. Converse**, 54 M.C.C. 447, 451 (1952). The fact that only the word "**stock**" in "**stock** in trade of drug stores" was underscored would appear to support appellant's contention that "**stock**" was a general commodity category and that the added words are merely a limitation by reference to place of sale. **Cf. Interstate Commerce Commission v. Ratner**, 6 Federal Carriers Cases, par. 80,415 (N.D. Ill., April 15, 1917): "**Such merchandise** as is dealt in by wholesale food business houses, and in connection therewith, **equipment, materials**, and **supplies** used in the conduct of such business * * *."

ARGUMENT.

I.

BY A MISTAKE WHICH IT HAS NO STATUTORY AUTHORITY TO CORRECT, THE COMMISSION GAVE NELSON A PERMIT WHICH AUTHORIZED THE TRANSPORTATION OF GOODS SUCH AS ARE SOLD IN DRUG STORES WITHOUT RESTRICTION AS TO CONSIGNOR, CONSIGNEE, OR ULTIMATE INTENDED DESTINATION.

A. During the grandfather period, Nelson performed the same function for Walgreen that the A & P contract carriers performed for A & P.

A comparison of the Commission's description of the A & P contract carriers' operations in the *Keystone* and *McAteer* cases with the description of Nelson's operations in his application and supporting documents shows that they were performing exactly the same kind of service for different types of shippers: both transported fixtures, supplies, and miscellaneous merchandise (stock in trade) belonging to the operator of a chain of retail stores (in one case, grocery stores; in the other, drug stores) exclusively for that shipper. Chairman Eastman's description of this intra-mural kind of operation, in the *Keystone* case, also accurately describes Nelson's service for Walgreen (p. 498):[7]

> It serves the peculiar needs of chain-store organizations whose operations are scattered over a wide territory and require a varied and flexible transportation service between warehouses and stores and points of supply which will be as completely under the domination of the management as any other phase of the business.

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[7] A detailed comparison of the operations of Nelson and the A&P contract carriers is contained in the Appendix, infra.

B. In the compliance orders issued to Nelson and the A & P contract carriers, the Commission merely used different language to describe their identical functions, and did not intend the issuance of permits authorizing different future operations.

The Commission was required, by the grandfather clause of the Motor Carrier Act, to grant to qualified applicants substantial parity between pre-regulation and post-regulation operations. *Alton R. Co.* v. *United States*, 315 U.S. 15 (1942). First, the Commission had to determine what the applicant's grandfather operations consisted of—and this was done by a finding incorporated in Nelson's and the A & P contract carriers' compliance orders, which were issued about the same time.[8] Having comparable operations to define, the Commission used the following language to describe the commodities transported (*Keystone* at 482-483; R. 231):

A & P Contract Carriers' Compliance Orders	*Nelson's Compliance Order*
Such merchandise as is dealt in by wholesale, retail, and chain grocery and food business houses and in connection therewith, equipment, materials, and supplies used in the conduct of such business.	*New and used store fixtures, new and used household goods,* and *stock* in trade of drug stores.

[8] The compliance order of one of the A&P contract carriers (McAteer) was issued on the same day as Nelson's: February 14, 1938. (**McAteer** at 36; R. 215,230.) At least 189 similar compliance orders were issued to A&P contract carriers between the time the pattern was established by Jones' amended order (November 29, 1937) and the time the Commission stayed 83 of the orders pending the outcome of the **Keystone** case (May 20, 1938). **Keystone** at 476, 483-484.

There is no sure way of knowing why the Commission used different language to describe similar operations. However, we believe the explanation is to be found in the fact that the Commission had not, at this early stage, developed stereotyped phrases having well established connotations; rather, the Commission simply followed the practice of adopting, wherever possible, the commodity descriptions used by carriers in their applications.[9] *Eclipse Motor Lines, Inc., Interpretation of Certificate*, 52 M.C.C. 391 (1951). The A & P contract carriers applied for permits to transport "such commodities * * * as are merchandised * * * by the Great Atlantic and Pacific Tea Company" (*McAteer* at 36)[10]; their compliance orders authorized the transportation of "Such merchandise as is dealt in by * * * grocery and food business houses" (*Keystone* at 483). The similarity is obvious. Nelson applied for a permit to transport "miscellaneous merchandise" (R. 247-248); his compliance order authorized the transportation of "*stock* in trade of drug stores" (R. 232). Obviously, the Commission

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[9] The Commission later came to regret this practice (**Descriptions in Motor Carrier Certificates**, 61 M.C.C. 209, 211 (1952)):

> In the determination of the operating rights of the large number of motor carriers under the 'grandfather' clause of the act, we unwittingly created some of our present difficulties. In the issuance of 'grandfather' certificates to special commodity carriers we were governed in some instances by the terminologies used by the parties in describing the commodities or class of commodities they had transported. Therefore, some of the uncertainties and ambiguities and difficulties of enforcement arise from the inept choice of generic terms used in filing applications for operating authority and carried forward into the certificates.

[10] Inasmuch as the Company assisted all of the A&P contract carriers in filing their applications and inasmuch as all were performing the same kind of service for A&P, we can assume that McAteer's application was typical. **Keystone** at 482.

refused to adopt the language of Nelson's application because it would have resulted in a general commodity authorization; instead, the Commission limited the authorized range of commodities by reference to the kind of stores where they are stocked for sale to customers.[11]

Regardless of the manner in which the Commission arrived at its choice of language to describe the commodities transported by Nelson and the A & P contract carriers during the grandfather period, one thing is certain: neither phrase had acquired any special meaning at the time and there is no reason to believe that, in describing parallel operations, the Commission intended to authorize the issuance of a more restricted permit to Nelson than to the A & P contract carriers. This conclusion is supported by the fact that the Commission described the phase of the A & P contract carriers' operations covered by the "such merchandise as is dealt in by" language of their compliance orders as follows (*McAteer* at 45):

> Naturally, the *stock in trade of A & P stores*, particularly groceries, fruits and vegetables, meats, dairy products, sea foods, beverages, and miscellaneous small household items, has composed the bulk of his [McAteer's] traffic. (Italics supplied.)

This use of the phrase is significant because it is the only case we know of in which the Commission gave any inkling as to the way in which it understood the phrase "*stock* in trade" and because the A & P contract carriers were performing the same type of service as Nelson.

Considering the situation as it existed when Nelson's and the A & P contract carriers' compliance orders were

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[11] The word "stock" was very likely taken from the statement submitted by Nelson in connection with his application. He stated that he usually carried to Walgreen's retail stores "store fixtures and equipment and merchandise for the opening **stock**" and that his equipment usually returned empty except for "old store fixtures and equipment and occasionally a transfer of **stock**." (R. 264; boldface supplied.)

granted, the Commission could not have intended to describe different operations by the phrases "*stock* in trade of" and "Such merchandise as is dealt in by."

C. Nelson's permit, like those issued to the A & P contract carriers, should have contained a Keystone restriction, but, by mistake, none was inserted.

We have shown that the compliance orders granted to Nelson and the A & P contract carriers must have been intended to describe and authorize transportation of the same broad range of general commodities, limited only by reference to the kinds of stores where they are stocked for sale to customers. Such transportation was broader than that which the A & P contract carriers had engaged in during the grandfather period because they had transported only for A & P and had transported only commodities owned by A & P. In order not to authorize transportation broader than was justified by their grandfather operations, the Commission found it necessary to invent the Keystone restriction. As Commissioner Eastman said in the *Keystone* case (p. 499):

> [The A & P contract carriers' service] is of a distinct type which is linked and interlocked with the operations of a definite class of shippers. *I know of no way to define it closely and accurately except by reference to that class of shippers.* (Italics supplied.)

Likewise, since Nelson was performing exactly the same kind of service for Walgreen, only a Keystone restriction would have closely and accurately described his grandfather operations. However, no Keystone restriction was imposed—even though his permit was issued in 1942, long after the Keystone restriction had been invented in 1939. (R. 232.) Instead, his permit contained exactly the same commodity description as his pre-Keystone 1938 compliance order.

The only conclusion to be drawn is that the Commission inadvertently failed to include a Keystone restriction in

Nelson's permit; for the record before the Commission at the time clearly indicated that such a restriction was appropriate.[12]

D. Nelson acquired the kind of broad, unrestricted commodity authorization which prompted the Commission to impose Keystone restrictions on the A & P contract carriers and such authorization cannot now be modified by interpretation.

We have shown that the phrase "*stock* in trade of drug stores", used in Nelson's 1938 compliance order and carried over into his 1942 permit without the superimposition of Keystone restriction, authorizes the same transportation as the A & P contract carriers could have engaged in, absent a Keystone restriction. Chairman Eastman described that transportation as follows (*Keystone* at 500):

> * * * * if a contract carrier were authorized to transport such merchandise as is dealt in by a large mercantile concern * * *, it could enter into a contract or contracts with any shipper or concern to transport any one or all of the commodities coming within such commodity description and moving within the territorial limitations of its permit.

Once a permit is issued, even though it mistakenly authorizes operations broader than warranted by the underlying grandfather operations, it can be revoked or modified only as provided by Congress; and there is no statutory authority under which the Commission may now correct (by interpretation or otherwise) its mistake in

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[12] Inasmuch as the Court has held that evidence of grandfather operations broader in scope than those reflected in Nelson's application and supporting documents can be appropriately utilized only in a connection with a petition to reopen the grandfather proceeding, appellant's argument here assumes, throughout, that Nelson was hauling only for Walgreen.

issuing Nelson's permit. Motor Carrier Act, Sec. 212(a) (49 U.S.C. 1952 ed., Sec. 312(a); *United States* v. *Seatrain Lines*, 329 U.S. 424; *Coastal Tank Lines, Inc.*, v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289, 392 (1948); *Atlantic Freight Lines, Inc.—Petition for Declaratory Order*, 51 *Frt. Lines, Inc.—Petition for Declaratory Order*, 51 M.C.C. 175, 191 (1949); *Vidas Contract Carrier Application*, 62 M.C.C. 106, 107 (1953).

II.

THE COURT'S REASONS FOR UPHOLDING THE COMMISSION'S RESTRICTIVE INTERPRETATION ARE FOUNDED UPON ERRONEOUS FACTS

A. "Stock in trade of drug stores", as used in Appellant's permit, does not connote possession.

Both Nelson and the A & P contract carriers were transporting commodities which "belonged to" their respective customers in the sense that the shippers owned the goods at the time of transportation. (R. 38, 265-266; *McAteer*, at 39-40.) Therefore, if "*stock* in trade of" connotes possession, so should "such merchandise as is dealt in by"—and yet the phrase has never been so interpreted.

Furthermore, if "*stock* in trade of" connotes possession and means the same as "drug stores' stock," as the Court has held, appellant should logically be restricted to transporting stock already owned by a drug store at the time of transportation—and yet not even the Commission goes so far. The Commission would permit appellant to transport not only such goods as are, at the time of transportation, part of the stock in trade of a drug store, but also such goods as are "intended to become [,] part of the stock in trade of a drug store." 63 M.C.C. 407, 411. Therefore, if the phrase "*stock* in trade of drug stores" meant to the Commission which issued Nelson's compliance order (1938) and permit (1942) what the Commission today says it

means, that Commission knowingly granted to Nelson a commodity authorization broader than he was entitled to receive on the basis of his grandfather operations as reflected in the record before the Commission. We believe it is more logical to conclude that the Commission mistakenly issued the 1942 permit using the language of the 1938 compliance order, without reviewing the application in the light of the intervening *Keystone* decision.

"*Stock* in trade of drug stores," as now interpreted by the Commission, would not have accurately defined Nelson's transportation for Walgreen; only the addition of a Keystone restriction would have accomplished that. However, when the phrase was first used, in the 1938 compliance order, the Commission's right to impose such a restriction had not been established and the Commission was issuing compliance orders containing a broad commodity description with no possessive connotation and without a Keystone restriction to the A & P contract carriers whose grandfather operations were the same as Nelson's. Therefore, even if it could be said that the phrase "*stock* in trade of" connotes possession in its ordinary usage, it seems clear that it was not used in that sense by the Commission which issued Nelson's compliance order and permit.

B. No significance may be attached to the Commission's failure to use the phrase "such merchandise as is dealt in by" (or comparable language) in Nelson's permit.

The Court points out that the Commission has usually used the phrase "such as" or a close variation thereof to indicate a generic description of commodities by reference to place of sale. This is certainly not surprising, considering that the phrase became so well known as a result of the 600 A & P contract carrier applications and the *Keystone* and *McAteer* cases. The phrase "*stock* in trade of" did not become so famous or so deeply imbedded in the Commission's commodity description glossary because it was

not involved in any volume of cases; in fact, Nelson's compliance order and permit are the only ones we have been able to find in which the phrase was used. It certainly adds no strength to the Commission's position to point out that a phrase like "such merchandise as is dealt in by" has, over the years, taken on the significance of a term of art; the question at issue in this case is what was meant when Nelson's compliance order and permit were issued containing the phrase "*stock* in trade of drug stores" and we have shown that the phrase was intended to describe the same transportation as the "Such merchandise as is dealt in" phrase in the A & P contract carriers' permits.

Perhaps the most astounding thing about this case is to find the Commission arguing (and the Court agreeing) that if Nelson's permit read "such merchandise as is dealt in by drug stores", rather than "*stock* in trade of drug stores", the Commission's interpretation of appellant's permit would be erroneous. In *Interstate Commerce Commission* v. *Ratner*, 6 Federal Carriers Cases, par. 80,415 (N.D. Ill. April 15, 1947), the Commission sought to establish that implicit in a "such merchandise as is dealt in by" commodity description was exactly the same kind of limitation which it now seeks to read into appellant's permit. Significantly, Ratner's contract carrier permit, like Nelson's, was issued in 1942 without a keystone restriction.[13] The Commission's attempt to restrict the

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[13] In **Dart Transit Co.—Modification of Permit**, 49 M.C.C. 607, 612 (1949), the Commission pointed out the distinction between a commodity description by reference to (1) intended use and (2) places where such commodities are dealt in and stated that the latter "are ordinarily made only to contract carriers **and are coupled** with a so-called Keystone restriction as to the type of shipper for which service may be rendered * * *." (Boldface supplied.) Therefore, the issuance of Ratner's permit without a Keystone restriction was a mistake which the Commission was trying to correct by interpretation.

scope of Ratner's permit was unsuccessful and, ever since, in its own decisions, the Commission has held that a "such merchandise as is dealt in by" (or similar) commodity description is nothing more than a generic commodity description by reference to place of sale. *Sanders Extension of Operations—Washington, D. C.*, 47 M.C.C. 210 (1947); *National Trucking Co., Inc., Ext.—Electrical Appliances*, 51 M.C.C. 638. (1950); *Vidas Contract Carrier Application*, 62 M.C.C. 106 (1953).

We have already shown that the Commission's choice of (1) "such merchandise as is dealt in by" to describe the A & P contract carriers' grandfather operations and (2) "*stock* in trade of" to describe Nelson's grandfather operations was based primarily upon language used in their respective applications and certainly was not intended to describe different operations because their operations were the same. We have also shown that, if the two phrases were intended to mean what the Commission now says they meant, (1) the Commission wrongly attacked Ratner's permit in 1947 and (2) the Commission which issued Nelson's permit in 1942 deliberately granted an operating authority broader than he was entitled to receive. We submit that no significance can be attached to the difference in language chosen to describe the same kind of operations, and that the only logical explanation of the Commission's attacks upon Ratner and appellant is that the Commission is trying to correct, under the guise of interpretation and without statutory authority, its early mistakes in issuing permits containing commodity descriptions by reference to place of sale without Keystone restrictions.

CONCLUSION.

Over the years the Commission has waged unceasing war against contract motor carriers—particularly those with grandfather rights broader than could be obtained under

the Commission's current policies. The Commission achieved a major victory when it successfully established, in the *Dart Transit Co.* and similar cases, that inherent in a commodity description such as "packing house supplies" was not only the obvious limitation that the supplies referred to must be such as are customarily used by packing houses, but also the further implied limitation that the supplies must be destined for use by a packing house. The Commission sustained a major defeat when it unsuccessfully attempted to impose the same kind of limitation on a "such merchandise as is dealt in by" commodity description in the *Ratner* case. However, if this Court's decision is allowed to stand, the Commission will have accomplished here what it failed to accomplish in the *Ratner* case because the language of appellant's permit, when viewed in historical perspective, cannot have been intended to mean something different from a "such merchandise as is dealt in by" commodity description. We do not believe the Court should sanction this further extension, using reasons which are demonstratively specious from an historical and analytical standpoint.

It may seem that the commodity authorization contended for by appellant is somewhat broad; however, it does contain the inherent limitation that the commodities must be such as are customarily stocked by drug stores and it is no more than appellant is entitled to, because of the Commission's mistake in failing to insert a Keystone restriction in Nelson's permit. The danger of permitting the Commission to correct such mistakes by subsequently developed subtleties of interpretation, contrary to the statutory prohobition, far outweighs the danger of one carrier operating under an unusually favorable permit.

For these reasons, appellant respectfully requests a rehearing of this case.

Respectfully submitted,

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March, 1958

Certificate of Counsel.

I hereby certify that this petition is presented in good faith and not for purposes of delay.

.....

VICTOR L. LEWIS

APPENDIX

The similarity between the grandfather operations of the Nelson and the A&P contract carriers is pointed up by the following:

1. Both restricted themselves to the service of one shipper:
   (a) the A&P carriers "devote themselves, or at least certain equipment which is prominently marked with A&P's name, to its service exclusively." *McAteer* at 39.
   (b) Nelson "is an interstate contract carrier of property for the Walgreen Company and for it alone." (R. 264.)
2. Both were required to transport anything, anywhere (within the local territory served by the distribution unit), anytime, as directed by the shipper served:
   (a) McAteer's truck "was placed at the unqualified beck and call of A&P and made available to haul anything, any place, any time, as directed by A&P." *McAteer* at 40.
   (b) Nelson testified that he "transported, wherever they [his customers, including Walgreen] wanted me to and under any condition." (R. 84.) He was registered with the NRA as an "ANYWHERE FOR HIRE Member of the Trucking Industry." (R. 229.)
3. The commodities transported all belonged to the shipper served:
   (a) "The commodities transported [by the A&P contract carriers] * * * moved from rail and water carrier terminals or the establishments of independent suppliers to the plants and warehouses

of A&P subsidiaries and departments, or directly to retail stores, also between such plants, warehouses, and retail stores." *McAteer* at 40. "A&P contract carriers also transport in-bound merchandise, supplies, and equipment from the plants of wholly independent producers or jobbers. If goods are purchased f.o.b. destination, neither A&P nor any of its carriers has anything to do with the transportation thereof, but if, as is frequently the case, purchases are made f.o.b. origin the transportation is performed by an A&P carrier for A&P." *McAteer* at 39-40.

(b) Nelson transported "store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees, * * *." (R. 265-266.)

4. Both transported a wide range of commodities, generally described as store fixtures and supplies and miscellaneous merchandise for the stock:

(a) "The commodities transported [by McAteer] varied greatly. * * * On some occasions, he hauled straight loads of a single commodity; on others, mixed loads of miscellaneous merchandise. On return from distribution trips to retail stores and on other occasions, various commodities were regularly transported to A&P salvaging, reconditioning, or processing plants." *McAteer* at 40. "Naturally, the stock in trade of A&P stores * * * has composed the bulk of his traffic. There also has been transported, however, a substantial volume of miscellaneous store and plant supplies, equipment, laundry, salvaged material * * *, and empty containers * * *." *McAteer* at 45-46.

(b) Nelson transported "store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees, in connection with the opening, closing and remodeling of stores * * *." (R. 265-266). "* * ** the commodities so transported [by Nelson for Walgreen] are usually store fixtures and equipment and merchandise for the opening stock. * * * his equipment usually returns empty, except for old store fixtures and equipment and occasionally a transfer of stock for Walgreen Company." (R. 264.)

5. Both operated, at first, under oral agreement with their respective shippers, but later, after motor carrier regulation commenced, reduced his agreement to writing—and many of the contractual provisions are similar. (*McAteer* at 41; R. 247, 270.)